said titles and memorandum to transfer notwithstanding the non-production of the issue document of title and the resolution of the board of the defendant;

(4) damages for breach of contract to be assessed by the Judge;

(5) the difference between the total purchase price and the redemption sum paid to MUI Finance to be refunded by the defendant to the plaintiff and such excess, if not agreed by the parties, shall be determined by the Court;

(6) Interest at 8% per annum from 31st July 1992 shall be paid by the defendant to the plaintiff on the difference between the purchase price and the redemption sum;

(7) Costs of this action to be paid by the defendant to the plaintiff.

THE PEOPLE'S INSURANCE CO. (MALAYSIA) SDN. BHD.

v.

V.P. NATHAN & PARTNERS (SUED AS A FIRM)

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[SUIT NO. D3-22-1423-92]
27 SEPTEMBER 1993

PRACTICE & PROCEDURE: Plaintiff seeking declarations - Remedy sought based upon default judgments which had been settled in full - Whether prosecution of suit frivolous and vexatious - Issues raised by plaintiff had been raised and determined in previous suit - Whether plaintiff estopped from raising the same issues - Whether principle of res judicata applies.

The defendant obtained judgments in default against the plaintiff and levied execution by attaching the plaintiff's premises. The plaintiff and the defendant subsequently entered into a settlement agreement whereby in return for certain discounts and the waiving of interest the plaintiff was to settle its debts by instalment payments on specified dates. The plaintiff defaulted in the payment of the instalments and the defendant claimed the full judgment sum.

The plaintiff filed the suit seeking declarations that the defendant was bound by the terms of the settlement agreement and that the defendant had waived their rights to insist on the strict terms of the default judgments.

The defendant contended firstly that the plaintiff was estopped from relying on the matters raised as all the issues raised by the plaintiff had already been adjudicated upon and secondly that as all the sums due under the two default judgments had already been settled in full, the declarations sought by the plaintiff were purely acedemic, and applied to strike out the suit.

Held:

[1] The defendant had clearly shown that the instalment payments had been accepted on a without prejudice basis. In the circumstances of the case, as the plaintiff had defaulted in the payment of instalments, there was no reason why the defendant should not enforce the two judgments fully and there is no waiver to prevent the defendant doing so.

[2] The learned Judge in the earlier suit had made a finding of fact on the credibility of the telephone conversation pertaining to the alleged waiver and had concluded that such a conversation on the waiver to be inherently improbable. To permit the plaintiff to rely again on the same conversation would be to reopen an issue that had already been determined and to that extent the principle of *res judicata* applies. The fact that issue estoppel or *res judicata* had not been pleaded makes no difference to the defendant's right to rely on such pleas as they are questions of law.

[3] The remedies sought by the plaintiff in this suit are in the nature of declarations for their legal rights which have since become academic as the two default judgments have already been settled in full. That being the case, the prosecution of this suit was frivolous and vexatious.

[Plaintiff's claim struck out with costs].

Cases referred to:
Low Kum Yoon v. Teh Kim Huah [1979] 1 MLJ 83 ***(refd)***
Pedley v. Majlis Ugama Islam Pulau Pinang & Anor. [1990] 2 MLJ 307 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Judy Gan; M/s. Mah Weng Kwai & Associates
For the defendant - Manjeet Singh; M/s. Manjeet & Associates

JUDGMENT

Siti Norma Yaakob J:
The plaintiff in these proceedings had been a client of the defendant, a firm of solicitors, for a good 20 years and in the course of that relationship, the defendant did legal work instructed by the plaintiff. This has resulted in professional fees and disbursements being incurred by the defendant and when the plaintiff failed to make payments on those fees and disbursements, the defendant sued the plaintiff in Civil Suit D3-22-1068-91 (the first suit) and Civil Suit D3-22-1723-91 (the second suit). Judgment in default for RM874,177,05 was obtained by the defendant against the plaintiff on 30 August 1991, in the first suit, and for RM950,179.25 on 11 January 1992, in the second suit. Both judgments carry interest at 8% per annum.

On 9 January 1992, the defendant levied execution against the plaintiff on the judgment obtained in the first suit by attaching the plaintiff's premises. However, at the request of the plaintiff, the attachment was lifted following a settlement agreement reached between them, whereby the defendant waived interest due on the judgment and allowed certain discounts in the fees and disbursements payable and the discounted amounts were to be settled in certain instalments to be made by certain specified dates, failing which the outstanding judgment including the discounted amounts and all interests due become payable forthwith. The terms of this settlement agreement are contained in the plaintiff's letter dated 9 January 1992.

It is not disputed that the plaintiff defaulted in the payment schedule as the instalments came either late or fell short of the agreed amounts.

Matters came to a head on 9 October 1992, when the defendant's solicitors put the plaintiff on notice that the defendant was insisting on their strict legal right to enforce not only the judgment obtained in the first suit fully but also on the judgment obtained in the second suit. This was followed by a second letter from the defendant's solicitors dated 13 October 1992, wherein the plaintiff were given until 15 October 1992, to pay all sums due under the 2 judgments.

The plaintiff did not meet the deadline but instead remitted a cheque for RM193,109.70 on 16 October 1992, which the defendant returned on the ground that the amount did not represent the final settlement of all sums due under the 2 judgments.

To this the plaintiff responded by writing a letter dated 19 October 1992, wherein the plaintiff allege that Mr. Nathan, a senior partner of the defendant firm, had in a telephone conversation with one Mr. Chang of the plaintiff, agreed to waive the defendant's right to execute fully on the 2 judgments, hence the cheque for the lesser sum of RM193,109.70. The same cheque was also enclosed with the plaintiff's letter together with another cheque for RM18,794.45 to make up for the wrong calculation in the payment of the first cheque.

The defendant by their solicitors' letter dated 20 October 1992, returned both cheques to the plaintiff and denied that Mr. Nathan had agreed to waive the defendant's right to execute fully on the 2 judgments.

Three days later on 23 October 1992, the plaintiff filed this suit before me, seeking a number of declarations, these being:

(1) that the defendant is bound by the terms of the settlement agreement dated 9 January 1992, as varied.

(2) that the defendant had waived their rights to insist on the strict terms of the 2 default judgments.

At the same time, the plaintiff made separate applications for stay of all execution proceedings in the two earlier suits. These applications were allowed by the Senior Assistant Registrar but on appeal, V.C. George, J allowed the appeal and ordered no stay. Following this, the plaintiff made full settlement of all sums due and payable under the 2 judgments but their appeals against the orders of no stay granted by V.C. George, J are pending before the Supreme Court.

It is against that background that the defendant now apply to have this suit before me struck out on the grounds that:

(1) all issues raised in the suit have already been adjudicated and, as such, the plaintiff are estopped from raising the same issues again.

(2) since all sums due under the 2 default judgments have already been settled in full, the declarations sought by the plaintiff are purely academic and to that extent, there is nothing left to be adjudicated on.

Although the plaintiff admit that they had not kept to the payment schedule as they had made short and delayed instalment payments, nonetheless, they maintain that by accepting such payments, the defendant had waived their right to insist on the strict terms of the 2 default judgments.

I consider that no such waiver exists as with each acceptance, the defendant had clearly shown that the acceptance was on a without prejudice basis. This is seen from the defendant's own letters. From such correspondence it becomes abundantly clear that for so long as the plaintiff kept to their part of the bargain by submitting the agreed instalments on the due dates, the defendant will not insist on their right to enforce the 2 judgments fully. In this case, the plaintiff had defaulted and I see no reason why the defendant should not enforce the 2 judgments fully and there is no waiver to prevent the defendant doing so.

The plaintiff have also admitted that the cause of action in this suit before me is based on facts similar to those applicable in proceedings for stay in the two earlier actions. In those applications, V.C. George J had made a finding of fact on the credibility of the telephone conversation pertaining to the alleged waiver which Mr. V.P. Nathan had with Mr. Chang and had concluded that such a conversation on the waiver to be inherently improbable. To rely again on this same conversation to support that there had been a waiver of the defendant's right to insist on the 2 judgments is, I consider, to reopen an issue that has already been determined and to that extent the principle of *res judicata* applies to prevent the same issue being determined for the second time. The fact that issue estoppel or *res judicata* had not been pleaded makes no difference to the defendant's right to rely on such pleas as they are questions of law. So too the fact that there are appeals pending against V.C.George's orders in the stay proceedings. They are irrelevant to the present proceedings before me.

Lastly, the remedies sought by the plaintiff in this suit are in the nature of declarations for their legal rights which have since become academic as the 2 default judgments have already been settled in full. That being the case, I see the further prosecution of this suit to be frivolous and vexatious and on the authorities of *Low Kum Yoon v. Teh Kim Huah* [1979] 1 MLJ 83, and *Pedley v. Majlis Ugama Islam Pulau Pinang & Anor.* [1990] 2 MLJ 307, I had allowed the defendant's application and struck out the plaintiff's claim with costs under O. 18 r. 19 of the Rules of the High Court 1980.